rates reflected in tariffs and is not violated by the forbearance rule, which allows eligible carriers to transact "off-tariff" for offerings not contained in any tariffs they may file. Thus, the forbearance rule is not at all inconsistent with the filed rate doctrine and Maislin.

C. Section 4(i) of the Communications Act Provides the Commission with Broad Authority to Employ Forbearance Regulation

The courts have consistently ruled that Congress has granted the Commission expansive powers under the Communications Act to adjust its regulatory policies and programs to meet prevailing industry conditions and public interest requirements. United States v. Southwestern Cable Co., 392 U.S. 157 (1968); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); FCC v. Pottsville Broadcasting Co., 309 U.S. 134 (1940). Congress provided the Commission with this plenary and flexible authority to avoid the need for continuous legislative solutions to regulatory issues arising in a dynamic industry. National Association of Theatre Owners v. FCC, 420 F.2d 194, 201 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

The Commission has exercised its expansive powers through the authority granted by Section 4(i) of the Act to alter drastically the character and scope of tariff regulation for AT&T and the Bell Operating Companies (BOCs), and the role and utility of tariffs in the regulatory process. It has replaced rate-of-return regulation for these carriers' individual services with

price-cap regulation that focuses on the aggregate movement of prices, not costs, in broad categories of services.[12/] In the process, the Commission has materially changed the significance and value of the tariffs of AT&T and the BOCs for individual services, and it has drastically reduced the quantity, specificity and utility of the descriptive materials filed by these carriers to justify their rates. In even more radically departing from its traditional approach to tariff regulation, the Commission now permits AT&T to provide service to business customers pursuant to "individually negotiated contracts," to be reflected in nominal tariffs.[13/] Moreover, the Commission continues to allow AT&T to provide service on a single customer basis.[14/]

As a result of these actions, and the general deregulatory policies the Commission has pursued with respect to AT&T and the BOCs in recent years, the Commission has wholly redefined the significance of any individual AT&T or BOC tariff as a vehicle for enabling the Commission to discharge its regulatory responsibilities. However, in the Commission's judgment, these

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[12/] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) (AT&T Price Cap Order), Second Report and Order, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order).

[13/] AT&T Communications, 4 FCC Rcd 4932 (1989), vacated and remanded sub nom. MCI Telecommunications Corp. v. F.C.C., 917 F.2d 30 (D.C. Cir. 1990), remand AT&T Communications, 6 FCC Rcd 640 (1991) (Tariff 12); Competition in the Interstate Interexchange Marketplace, 5 FCC Rcd 5880 (1991).

[14/] AT&T Communications, DA 92-107, released January 28, 1992 (Tariff 15), application for review pending.

actions were "necessary in the execution of its functions," 47 U.S.C. §154(i), given the prevailing conditions in the marketplace.

The forbearance rule must be considered no less necessary to the effective discharge of the Commission's statutory responsibilities to promote the development of wide-spread and efficient telecommunications services, unburdened by unnecessary regulation. If Section 4(i) of the Act authorizes the Commission to radically dilute the information value of the tariffs of dominant carriers, that provision must be viewed as similarly authorizing the Commission to continue with a tariffing program for non-dominant carriers, which reflects the very limited degree to which it remains necessary to "regulate" their services.

D. The Commission's Interpretation of its Statutory Authority to Forbear from Tariff Regulation Has Been Ratified by Congress

The correctness of the Commission's interpretation of its authority to implement and administer the forbearance rule under Section 203(b)(2) and other provisions of the Act is confirmed by Congress' acquiescence in that interpretation, which is decisive:

> [A] consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval.[15/]

15/ Kay v. FCC, 443 F.2d 638, 646-47 (D.C. Cir. 1970).

From the adoption of the Commission's forbearance rule in 1982 until the present, Congressional action (or inaction) in light of its knowledge of that rule demonstrates that Congress has acquiesced in the Commission's interpretation of its authority under the Act to adopt and implement the forbearance rule. As the U.S. Supreme Court has held under similar circumstances, Congressional acquiescence is a compelling indication that a questioned statutory interpretation is correct. See, e.g., McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 492-93 (1931) (the failure of Congress to amend a statute "in the face of the consistent administrative construction, is at least persuasive of a legislative recognition and approval of the statute as construed."); Strother v. Burnet, 287 U.S. 341, 345 (1932) ("The failure of Congress to alter or amend the section, notwithstanding this consistent construction by the department charged with its enforcement, creates a presumption in favor of the administrative interpretation, to which we should give great weight, even if we doubted the correctness of the ruling of the [agency].").

The Commission's interpretation of its authority to forbear from tariff regulation under Section 203 was brought to the attention of Congress many times in the years since its adoption in 1982. It is clear that Congress was well aware of the unfolding of the Commission's deregulatory policies throughout, and subsequent to, Competitive Carriers. Congress was also made aware of the fact that some parties were questioning whether the

Commission had the authority it claimed to possess in implementing the forbearance rule. Yet, Congress has never indicated disapproval of the Commission's interpretation of its authority under the statute. Indeed, it appears that the Commission may have taken the steps it did at the behest of Congress.

As shown below, the relevant Congressional oversight committees did not indicate disapproval of the Commission's forbearance rule; Congress continued to appropriate funds to the Commission despite knowledge of that rule and its application; it did not amend the statute to "correct" the Commission's interpretation of its authority; and, in fact, it amended tariff-related provisions of the Act without altering the modification language contained in Section 203(b)(2).

Similar Congressional action (or inaction) has been cited by the courts as persuasive -- if not conclusive -- indication that an agency's interpretation of its governing statute is not inconsistent with Congressional intent.

1. Congress Has Been Well Aware of the Forbearance Rule Since its Inception

A brief survey of Congressional activity since the Commission adopted its First Report and Order in Competitive Carriers in 1980 demonstrates that the Congress was well aware of the consideration and implementation of permissive tariffing, but took no steps to show disapproval of that policy or the Commission's interpretation of its statutory authority.

Even before the Commission adopted the forbearance rule in 1982 in the Second Report and Order, Congress was apprised of the Commission's goal of deregulating non-dominant interexchange carriers. For example, in 1980, after the Commission had adopted its First Report and Order in Competitive Carriers, promulgating streamlined regulation for non-dominant carriers, the House Committee on Interstate and Foreign Commerce released a Report on a House bill (H.R. 6121) that would have given the Commission an explicit mandate to deregulate. In that Report the Committee recognized that "the FCC has already begun the process of deregulating telecommunications carriers as a result of its Second Computer Inquiry decision and Competitive Carrier ruling." H.R. Rep. No. 96-1252, 96th Cong., 2d Sess., pt. 1, at 113 (1980). Addressing one section of the proposed legislation, the Committee explained, "Section 213 establishes a deregulation process for non-dominant carriers. The FCC has already established such procedures regarding competitive carriers in its Competitive Carrier ruling." Id.[16/]

In comments on H.R. 6121, the National Telecommunications and Information Administration (NTIA) explained that there was

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16/ H.R. 6121 was not passed. The Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary recommended against its passage. See H.R. Rep. No. 96-1252, 96th Cong., 2d Sess., pt. 2 at 1 (1980). The Subcommittee's adverse report was predicated on the fact that the bill would "have to be substantially redrafted to overcome its perceived [antitrust] defects." Id. Those defects were based on insufficient regulation of the dominant carrier. Id. Therefore, the bill's treatment of non-dominant carriers was not a factor in the adverse report.

"uncertainty over whether the Commission has the power to forbear from regulation," and thus advocated giving the Commission "explicit authority to forbear from regulation which does not serve the purposes of the Act." Id. at 123. NTIA continued, "It can be argued that the Commission has sufficient flexibility under the 1934 Act to adapt its regulations and policies to today's realities, but the Commission's attempts to do so have been subject to long and disruptive court challenges which show no signs of abating." Id. at 129. It also noted that "the courts are divided on this point, and any Commission decision to forbear would surely be subject to an arduous appellate review." Id. at 132 (footnote omitted). Although, as noted, H.R. 6121 did not pass, it is noteworthy that in the course of considering the legislation, Congress was provided with at least one appraisal of the scope of the Commission's existing deregulatory authority under the Communications Act.

One year later, the Senate considered another "rewrite" of the Communications Act. In discussions regarding the new legislation, certain members of Congress expressed impatience with the pace of deregulation. For example, on October 5, 1981, during floor debate on S.898, the Telecommunications Competition and Deregulation Act of 1981, Senator Hollings, then Ranking Minority Member of the Communications Subcommittee, remarked:

> There are certain things that [the] FCC has done. . . . in November of last year, they did find whether or not there was a competitive marketing [sic] in their competitive carrier rulemaking.

> At that particular time, if you please, AT&T contended that the FCC did not even have that kind of authority. They challenged the Commission as legally deficient to make a dominant-nondominant carrier approach to fulfill the regulatory responsibilities. It said that Congress did not give the explicit statutory authority to classify carriers. On the contrary, it is well established that the Commission has broad discretion in choosing how to regulate and they did regulate on a dominant-nondominant fashion. . . .
>
> They said, having found A. T. & T. and the independent telephone companies come within the definition of dominant carriers, all other carriers classified as nondominant could then come into what they called the streamlined tariff rate. This has been at the insistence of the Senator from Oregon and the Senator from South Carolina. We have been commanding them, shoving them, saying we hoped we could get a bill through Congress, but, in the meantime, let us go to deregulation.[17]

Once the Commission adopted its forbearance rule in 1982 in the Second Report and Order in Competitive Carriers, Congressional interest in the Commission's deregulatory approach was heightened even further. For example, on July 28, 1983, then Chairman Fowler appeared at a joint hearing before the Senate Committee on Commerce, Science and Transportation, and the House Committee on Energy and Commerce to discuss proposed amendments to the Communications Act of 1934. His prepared remarks squarely addressed the Commission's forbearance rule and its interpretation of the agency's underlying authority.

> [R]ecent proposed legislation would amend the Communications Act to give the Commission authority to forebear from regulating

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17/ 127 Cong. Rec. S11055 (daily ed. October 5, 1981) (statement of Sen. Hollings) (emphasis added).

> telecommunications services and facilities if forbearance is warranted by the level of competition. It is my view that such legislation would provide useful clarification of the extent to which the Commission has authority to exercise its discretion to refrain from imposing regulation upon competitive segments of the telecommunications industry. There is no need to impose the full panoply of rate, entry-and-exits, and service regulation under Title II of the Communications Act upon telecommunications companies with limited market power. The view of the Commission has been that Title II of the Communications Act can be fairly construed as being designed to limit the conduct of dominant telecommunications firms, and that the mechanisms of Title II do not promote the public interest when employed with respect to the conduct of firms which do not have market power. Clarification of the Act in this regard would facilitate the continuation and expansion of the pro-competitive policies we have developed.[18/]

Despite having been apprised of the desirability for a "clarification" of the limits of the Commission's authority to refrain from regulation, Congress took no action in this regard in 1983.

The Commission's forbearance rule was the focus of Congressional activity the following year, 1984, but resulted in no disapproval of that policy. On October 10, 1984, Senator Donald Riegle wrote a letter to Chairman Fowler expressing concerns that, with the implementation of equal access, the public was confused about the rates and services offered by the

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18/ Universal Telephone Service Preservation Act of 1983: Joint Hearings on § 1660 and H. 3621 Before the Senate Comm. on Commerce, Science, and Transportation and the House Comm. on Energy and Commerce, 98th Cong., 1st Sess. 115 (1983) (Statement of Hon. Mark S. Fowler, Chairman, FCC) (emphasis added).

various competing interexchange carriers. See 131 Cong. Rec. S907 (daily ed. January 31, 1985). Senator Riegle requested that the Commission consider developing a "disclosure form" which each carrier would be required to complete and send to each potential customer. Id. On October 25, 1984, Chairman Fowler replied by letter to Senator Riegle, declining to impose such a requirement, and explaining:

> Throughout our Competitive Carrier proceeding, begun in 1980, the Commission, in order to promote competition and lower costs, has taken repeated steps to identify and eliminate unnecessary regulation of certain classes of carriers in the various telecommunications markets, including the interexchange telephone market. . . . Because non-dominant carriers lack market power we have found the filing of rate schedules generally unnecessary and unreasonably burdensome.
>
> While AT&T, with sufficient market power to be considered a dominant carrier, remains subject to full rate and facilities regulation under the Communications Act, the other long distance providers are currently subject to minimal filing requirements. We are continuing these efforts to minimize unnecessary regulatory burdens on non-dominant carriers and are currently considering a mandatory detariffing of these non-dominant "specialized" common carriers.

Id. at S907 (emphasis added). On January 31, 1985, Senator Riegle placed both his letter and Chairman Fowler's reply into the record at the time that he introduced a bill that would have required various forms of disclosure by interexchange carriers. Id. at S904-S907. The bill never surfaced from the Senate committee to which it was referred.

By 1985, Congressional awareness of the Commission's forbearance rule was a given. Indeed, if any questions arose over that policy, they related to concerns that the Commission might extend the rule to AT&T, not whether the Commission had the authority to forbear from regulating non-dominant carriers, as it had been doing for some time. On February 5, 1985, Representative John Bryant introduced a bill for the purpose of "prevent[ing] the premature deregulation of AT&T." 131 Cong. Rec. E384 (daily ed. February 6, 1985). With an eye on the Commission's Competitive Carriers proceedings, Rep. Bryant explained that his bill would prevent the application to AT&T of "forbearance from regulation within the meaning of the Commission's orders issued in CC Docket No. 79-252." Id. at E385.

Later that year, on September 11, 1985, in a statement before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation, Chairman Fowler made crystal clear to that key Senate Subcommittee the result of the Commission's forbearance rule:

> Before closing, I'd like to present a snapshot view of the long distance marketplace today. Our Industry Analysis Division's information and other data indicate that there are a large and rapidly growing number of firms providing interstate telephone service. We do not know precisely how many. We do not know because, as part of our effort to reduce unneeded regulation, we have exempted all "non-dominant" firms from most of our regulatory processes. They no longer need our permission to enter the market, construct facilities, offer new services, change prices, or otherwise operate

> their businesses. In January, we published a list (which I have attached to my testimony) of some 250 carriers that had opted to file their interstate tariffs with the Commission. Many others . . . are not on the list because they did not choose to file FCC tariffs for their services.[19/]

On the same day, Commissioner Quello submitted a statement to the Subcommittee explaining, "The OCC's are free to price their service at will, while AT&T must abide by the cumbersome FCC tariff process which requires public comment . . . ."[20/]

Finally, during that same hearing, AT&T expressed displeasure that "AT&T remains under full traditional rate base, rate of return public utility regulation, whereas our competitors enjoy forbearance [from] such regulation." Id. at 134 (Questions of Senator Goldwater and the Answers).

Since 1985, the Congress has been repeatedly informed of the Commission's forbearance rule by both the Commission[21/] and its

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19/ Statement of Mark S. Fowler, Chairman, FCC, on Long Distance Telephone Competition before the Senate Committee on Commerce, Science and Transportation, Subcommittee on Communications, September 11, 1985 (emphasis added).

20/ Long-Distance Competition, 1985: Hearings Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science and Transportation, 99th Cong., 1st Sess. 105 (1985) (Statement of James H. Quello, Commissioner, FCC).

21/ For example, on September 10, 1986, Chairman Fowler reiterated before Congress that "the Commission has decided not to impose the burdens of economic regulation on carriers that do not possess market power . . . ." Federal Telecommunications Policy Act of 1986: Hearings on § 2565 Before the Senate Comm. on Commerce, Science and Transportation, 99th Cong., 2d Sess. 89 (1986) (Questions of Senator Riegle and the Answers).

And, on January 25, 1988, FCC Chairman Dennis Patrick responded by letter to a series of questions that had been

(continued...)

regulatees.[22] Yet, Congress did not criticize those policies

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[21] (...continued)
written to him in a letter on December 7, 1987, from Representative John Dingell, Chairman of the House Committee on Energy and Commerce, and Representative Edward Markey, Chairman of the House Subcommittee on Telecommunications and Finance. The primary subject of the questions and answers was the Commission's proposed price cap regulation of AT&T. In answer to a question the Congressmen had asked regarding the Commission's rate regulation authority, Chairman Patrick responded:

> Courts have consistently found in the Act's statutory scheme a congressional intent to vest in this Commission broad discretion in selecting the tools it will use to ensure just and reasonable rates. Moreover, courts explicitly have determined that such discretion extends to the Commission's selection of methods to make and oversee rates. While we presently rely on rate-of-return regulation to achieve just and reasonable rates in many instances, we also employ alternative approaches -- including an increased reliance on market forces -- in situations in which such alternatives constitute reasonable and appropriate means of achieving that result. Indeed, we apply no [cost of service] or rate-of-return regulation whatsoever to interexchange carriers other than AT&T [citing the Competitive Carriers proceedings].

Letter from Dennis R. Patrick, Chairman, FCC, to Honorable John D. Dingell and Honorable Edward J. Markey, at Attachment p. 9 (January 25, 1988) (emphasis added).

[22] On November 10, 1987, a hearing was held before the House Subcommittee on Telecommunications and Finance on the subject of the Commission's proposed price-cap regulation of AT&T. In his statement given during that hearing, AT&T Vice President Lawrence Garfinkel explained, "It has been five years since the FCC formally ended its active tariff regulation of AT&T's competitors, leaving AT&T the only interexchange carrier subject to those requirements." FCC Telephone Price Cap Proposal: Hearings Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce, 100th Cong. 86 (1988) (Statement of Lawrence Garfinkel, Vice President of Marketing Services, AT&T).

(continued...)

or propose to amend the Act to "correct" the agency's interpretation of its authority.

Perhaps most indicative of Congressional ratification of the Commission's forbearance rule were actions taken in 1988 (amending the investigation decision schedule in Section 204) and in 1989 (amending the Act to address operator service providers).

In 1988, Congress passed the "FCC Authorization Act of 1988." Pub. L. No. 100-594, 102 Stat. 3021 (1988). Significantly, Section 8 of that Act amended the tariff review process by setting deadlines by which the Commission would be required to complete tariff investigations. 102 Stat. at 3023. In amending the tariff review process, however, Congress did not address -- let alone change -- the Commission's authority to forbear from requiring non-dominant carriers to file tariffs even though, as shown above, Congress had been aware of the Commission's forbearance rule for a long time.

And, on August 3, 1989, the House Committee on Energy and Commerce released its report on H.R. 971, the Telephone Operator Service Consumer Protection Act of 1989, regarding alternative operator service providers ("AOS providers"). In that report, the Committee recognized the operation of the Commission's forbearance rule, stating that "[s]ince the FCC classifies these AOS providers as 'non-dominant' or carriers with[out] market power, the Commission currently does not regulate their rates."

22/ (...continued)

H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 3 (1989). Because AOS providers were non-dominant carriers, Congress recognized that the forbearance rule would result in their not being required to file tariffs. Rather than questioning that policy, the Congress acknowledged its existence and, to address concerns about the rates of AOS providers, it decided to require that AOS providers file "informational tariffs" with the Commission. Id. at 14. Surely, under the circumstances, Congress' requiring a subclass of non-dominant carriers to file informational tariffs with the Commission, while not otherwise disturbing the forbearance rule, is clear indication of its acceptance of that rule.

2. Congress' Ratification of the Commission's Interpretation of its Statutory Authority to Pursue Forbearance Regulation Is a Compelling Indication that the Interpretation Is Correct

a. The Congressional Committees Responsible for Oversight of the Commission Knew of the Commission's Interpretation and Did Not Indicate Disapproval

As demonstrated above, the Congressional Committees responsible for monitoring the Commission's operations were well aware of the agency's forbearance rule and did not indicate their disapproval. Judicial precedent demonstrates that such acquiescence by the responsible oversight committees is entitled to particular weight in assessing whether an agency's interpretation of its governing statute is correct.

For example, in Power Reactor Development Co. v. International Union of Electrical, Radio and Machine Workers, 367

U.S. 396 (1961), the Court considered the Atomic Energy Commission's (AEC) interpretation of a provision of the Atomic Energy Act of 1954 regarding licensing procedures. In determining that the agency's interpretation of the Act was correct, the Court said that "demanding [of] particular weight" was the fact that the AEC's interpretation had "time and again been brought to the attention of the Joint Committee of Congress on Atomic Energy," the congressional committee responsible for oversight of the agency. 367 U.S. at 408. The Court continued:

> No change in this procedure has ever been suggested by the Committee, although it has on occasion been critical of other aspects of [agency] proceedings not before us. It may often be shaky business to attribute significance to the inaction of Congress, but under these circumstances, and considering especially the peculiar responsibility and place of the Joint Committee on Atomic Energy in the statutory scheme, we think it fair to read this history as a de facto acquiescence in and ratification of the Commission's licensing procedure by Congress.

Id. at 409.

Likewise in Mobil Oil Corp. v. Federal Energy Administration, 566 F.2d 87 (Temp. Emer. Ct. App. 1977), Federal Energy Administration (FEA) officials "gave extensive testimony to Senate and House oversight committees" regarding particular regulations which were challenged as being outside the authority granted by the Emergency Petroleum Allocation Act (EPAA). 566 F.2d at 100. When Congress subsequently modified or reenacted the EPAA three times "without suggesting that the FEA lacked the authority it was obviously exercising," the court found that

Congress had implicitly ratified the agency's interpretation of the statute. Id. at 100-101.

Here, through the testimony of Chairman Fowler and others, the Commission's interpretation that the Communications Act allows it to forbear from requiring non-dominant carriers to file tariffs has "time and again been brought to the attention" of the committees responsible for oversight of the Commission. Because those committees, the Senate Committee on Science, Commerce and Transportation and the House Committee on Energy and Commerce, never suggested during general oversight hearings, or during hearings or reports on particular proposed legislation, that the Commission "lacked the authority it was obviously exercising," the two Committees -- with fingers on the Commission's pulse -- and, by extension, Congress itself must be found to have ratified the Commission's authority to forbear from requiring non-dominant carriers to file tariffs.

b. Despite Full Knowledge of the Commission's Construction of the Statute, and of Challenges to that Construction, Congress Failed to Change the Statute or Adopt Amendments Which Would Have "Corrected" the Commission's Interpretation

It is beyond dispute that Congress was well informed of the Commission's allowance of permissive tariffing since the approach was first adopted in 1982. Nevertheless, Congress did not criticize that policy -- let alone seek to amend the statute to change the Commission's approach -- at any time. As the case law indicates, this inaction too is, at a minimum, persuasive

evidence that the Commission's forbearance rule has met with Congressional approval and comports with Congressional intent.

For instance, in Natural Resources Defense Counsel, Inc. v. U.S. Nuclear Regulatory Commission, 582 F.2d 166 (2d Cir. 1978), the Nuclear Regulatory Commission's (NRC) licensing of nuclear power plants prior to finding safe, permanent storage for the radioactive waste generated by the plants was challenged as violating the Atomic Energy Act of 1954. The NRC argued that such an approach to licensing was not a violation of the Act, and demonstrated that Congress knew that the agency had been licensing the plants in spite of the lack of storage for radioactive waste.

The court upheld the NRC's interpretation of the Act, saying:

> We are satisfied that Congress did not intend such a condition [on the licensing]. If it did, the silence from Capitol Hill has been deafening. It is incredible that [the Atomic Energy Commission] and its successor NRC would have been violating the AEC for almost twenty years with no criticism or statutory amendment by Congress, which has been kept well informed of developments.

582 F.2d at 171. The court then explained that an agency's interpretation of its own statute is accorded great weight, and that it is "'entitled to additional weight where it has been impliedly indorsed by the legislature, as . . . by the failure of the legislature, with knowledge of such construction, to change the law or adopt amendments.'" Id. (quoting 82 C.J.S. Statutes § 359 at 769 (1953)). See also Norwegian Nitrogen Products Co. v.

United States, 288 U.S. 294, 313 (1933) ("Acquiescence by Congress in an administrative practice may be an inference from silence during a period of years," and that inference is strengthened when the agency's "procedure and methods" relevant to the issue in question have been explored by the Congress during the relevant time period).

Here, the Commission's forbearance rule and its application were fully understood by Congress after it was brought to the legislature's attention in a number of contexts over the past decade. Yet, Congress never saw fit to criticize that rule or to amend Section 203(b)(2) of the Communications Act (which the Commission relied upon to justify its policy) so as to mandate a tariff-filing requirement. Thus, Congress has impliedly endorsed the Commission's interpretation of its authority.

c. Congress Continued to Appropriate Funds to the Commission Without Criticism of the Forbearance rule

Congress' implicit endorsement of the Commission's permissive forbearance rule can also be divined from its continuing enactment of Commission appropriations bills in the face of knowledge of that rule. As the Court explained in Natural Resources Defense Counsel, Inc. v. U.S. Nuclear Regulatory Commission, 582 F.2d 166 (2d Cir. 1978), Congressional approval of a challenged agency action may be "implicit in the annual appropriations over a period of [many] years." Id. at 172

(quoting Alaska Steamship Co. v. United States, 290 U.S. 256, 262 (1933)).

d. Congress Amended the Communications Act Without Altering Section 203(b)(2)

Perhaps the most compelling indication of Congress' ratification of the Commission's interpretation of its authority to forbear from tariff regulation is the legislature's amendment of the Communications Act in related areas without addressing the Commission's interpretation of Section 203(b)(2).

The Supreme Court has made clear the significance of such Congressional action. In United States v. Rutherford, 442 U.S. 544 (1979), the Food & Drug Administration interpreted the Federal Food, Drug and Cosmetic Act of 1938 to not permit an exemption that would allow experimental drugs to be given to terminally ill persons. The Court, in affirming the FDA's position, found that the FDA had consistently interpreted the statute in that manner and that "Congress ha[d] not acted to correct any misperception of its statutory objectives." 442 U.S. at 553-54. The Court explained:

> To be sure, it may not always be realistic to infer approval of a judicial or administrative interpretation from congressional silence alone. [Citations omitted]. But once an agency's statutory construction has been "fully brought to the attention of the public and the Congress," and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned. [Citations omitted].

Id. at 554 n.10.

Similarly, in Kay v. FCC, 443 F.2d 638 (D.C. Cir. 1970), the court, in ruling on a challenge to the FCC's interpretation of Section 315 of the Communications Act, observed "an added circumstance which has some persuasive weight is that Congress on two recent occasions has taken action to amend section 315 without making any change" in the provisions at issue, even though it was aware of the Commission's interpretation of those provisions. 443 F.2d at 646. The court explained:

> Congress, of course, is not required to act each time a statute is interpreted erroneously and legislative silence in the face of such interpretation is not necessarily equivalent to legislative approval. However, a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval.

Id. at 646-47 (footnotes omitted). See also NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974).

Here, the Commission's forbearance rule was "fully brought to the attention of the public and the Congress" and Congress has amended the statute, even tariff-related sections of the statute, without seeking to alter the Commission's interpretation of its authority to forbear from requiring tariff filings by non-dominant carriers. Moreover, as shown above, in amending the statute by enacting the Operator Services Act, Congress clearly recognized the absence of tariff-filing obligations for non-dominant carriers, such as AOS providers, and expressly provided

for their filing of "informational tariffs" -- all this without ever questioning the agency's rule of permissive tariffing. In doing so, the Congress, at a minimum, implicitly recognized that no other provision of the Act -- as then administered by the Commission -- mandated a tariff-filing "requirement" for such carriers.

Had Congress wanted to modify the forbearance treatment afforded the entire class of non-dominant carriers (and not merely AOS providers), it certainly could have done so. Instead, it explicitly recognized that non-dominant carriers, as a class, are not required to file tariffs, and it imposed a rudimentary tariffing requirement only on a small group of non-dominant carriers, namely, AOS providers. H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 3, 14 (1989). In addition, Congress authorized the Commission to eliminate the informational tariff-filing requirement on AOS providers if, after four years, certain findings could be made. See 47 U.S.C. §226(h)(1)(B). Significantly, such a provision in the law plainly discloses an assumption by Congress that AOS providers -- as non-dominant carriers -- are not subject to any other tariff filing requirement under the Communications Act.

As noted above, amendment of a governing statute without changing an agency's interpretation of that statute, by itself, indicates Congressional acquiescence in the agency's interpretation. When coupled with an awareness of well-known challenges to the agency's interpretation, Congressional

amendment of a statute without addressing the challenged agency interpretation provides compelling proof of Congress' ratification of the agency's interpretation. See Mobil v. FEA, supra, and Kay v. FCC, supra.

e. Although the Commission May Have Adjusted its Interpretation of Section 203, Congress Has Ratified the Commission's Present Interpretation

The fact that the Commission may not always have interpreted its authority under the Act to permit forbearance regulation is no indication that its present interpretation, which it has held for nearly a decade now and to which the Congress has acquiesced, is improper. In Alstate Construction Co. v. Durkin, 345 U.S. 13 (1953), the Wage and Hour Administrator interpreted a provision of the Fair Labor Standards Act in one way during the first seven years after passage of the Act, and then concluded that the provision should be construed differently. The petitioners argued that such a change was an indication that the new interpretation should not be given any weight. 345 U.S. at 16. The Court rejected that argument, explaining "The new interpretation was reported to congressional committees on a number of occasions" and had been severely criticized by affected employers; yet, Congress had refused to repudiate it. Id. at 16-17. Therefore, the Court affirmed the administrator's interpretation of the Act. Id. at 17.

In Grocery Manufacturers of America, Inc. v. Gerace,[23/] the State of New York challenged an FDA regulation as being inconsistent with the pre-regulation "judicial construction of the FDCA and its predecessor statutes." 755 F.2d at 999. The court said:

> If we were addressing the validity of the FDA regulation in or about 1973, the year of its promulgation, we might be inclined to reject it. But the regulation has been in effect for eleven years. Congress' failure during this period to alter the relevant statutory language or to otherwise condemn the regulatory definition, while not a failsafe guide, allows us at least to infer that it has acquiesced in the FDA's construction.

Id. at 1000 (citations omitted). Likewise, Congress has acquiesced in the Commission's forbearance rule by failing during the past ten years to alter the statute or to otherwise condemn the rule and its well-known application.

f. The Commission's Interpretation of the Act It Is Charged with Administering, and Congress' Ratification of that Interpretation, Is Entitled to Great Weight

The Commission's interpretation of the statute it is charged with administering is entitled to great weight. See NRDC v. USNRC, 582 F.2d at 171; McCaughn v. Hershey Chocolate Co., 283 U.S. at 492; NLRB v. Bell Aerospace Co., 416 U.S. at 274-75. As demonstrated above, it is entitled to additional weight because it has been endorsed by the Congress. Congress, and particularly

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23/ 755 F.2d 993 (2d Cir.), cert. denied, 474 U.S. 820 (1985).

the committees charged with oversight of the Commission, were well aware of the forbearance rule and of the fact that it was questioned in some circles. Congress explored over many years during public hearings, both in general oversight hearings and in hearings on particular legislative proposals, the Commission's entire scheme of regulating interexchange carriers. Yet, Congress amended the Communications Act in other respects without ever effecting changes pertaining to the way the Commission was regulating non-dominant carriers, and it passed numerous appropriations bills without criticizing or correcting the Commission's forbearance rule.

At a minimum, "[i]n these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." NLRB v. Bell Aerospace Co., 416 U.S. at 275. Given the Commission's decade-long interpretation of its statutory authority to pursue its forbearance rule and the fact that this interpretation was clearly brought to the attention of Congress during these years, Congress' refusal to change that policy "is almost conclusive evidence that the interpretation has congressional approval." Kay v. FCC, supra, 443 F.2d at 646-47.

II. IF THE COMMISSION'S CURRENT FORBEARANCE RULE IS FOUND TO BE UNLAWFUL, THEN ALL COMMON CARRIERS MUST FILE TARIFFS

In adopting the regulatory regime that has worked well to advance the prospect of effective competition in today's interexchange telecommunications marketplace, the Commission